90-478

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

HEBERTO LORENZO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WM. J. SHEPPARD
ELIZABETH L. WHITE
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Fl. 32202
(904) 356-9661

ATTORNEYS FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

The Volusia County Sheriff's Office conducted a warrantless "inventory" search of petitioner's vehicle. During that search, a closed personal bag was opened, despite the absence of a written directive or policy of the searching agency mandating the opening of such closed containers. May the Government introduce the fruits of such a search into evidence when the container was opened despite the absence of established procedure and for a purely investigatory purpose?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

HEBERTO LORENZO,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

The petitioner, Heberto Lorenzo, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on June 7, 1990.

OPINION BELOW

The Court of Appeals per curiam affirmed the district court's ruling on

April 26, 1990. (See Appendix B). A timely petition for rehearing was denied on June 7, 1990. (See Appendix C).

JURISDICTION

The per curiam affirmance by the United States Court of Appeals for the Eleventh Circuit was entered on April 26, 1990. (See Appendix B). A timely petition for rehearing was denied on June 7, 1990 (See Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case requires interpretation of the prohibition against unreasonable searches and seizures contained in the Fourth Amendment to the United States Constitution, which provides, "The right of the people to be secure in their

persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

STATEMENT OF THE CASE

In the late summer of 1988, Federal Bureau of Investigation Special Agents Theresa McBride and Ron Bascome conducted an undercover "sting" operation attempting to purchase cocaine from the targets of the investigation, Alfredo Bermudez and Pedro Napoles. Negotiations for delivery of 20 kilograms of cocaine were conducted with Alfredo Bermudez, who communicated with Special Agent McBride by use of a beeper number and telephone call.

Alfredo Bermudez conducted all of the negotiations with the Government agents, and he set the time and place

for delivery of five kilograms of cocaine.

The meeting occurred at 8:00 p.m. on September 15, 1988, at the Howard Johnson's in Daytona Beach, Florida. At the meeting, a man and a woman were with Bermudez, neither of whom were previously known to the agents. The man and woman were later identified as petitioner Heberto Lorenzo, and his girlfriend, Miriam Suarez.

The agents directed Bermudez to follow them to another location for the exchange. Agent McBride conversed solely with Bermudez, trying to make arrangements for the exchange; neither of the other occupants of the suspect vehicle ever communicated with her. The agent tried to persuade Bermudez to complete the exchange, but Bermudez was conversing in Spanish with Lorenzo, who

was seated in the driver's seat of the vehicle. The only thing McBride could understand from the petitioner was, "No, no, no." At that point, the prearranged take-down signal was given, and the car and its occupants sped away.

The suspect vehicle left the parking lot with the agent's unmarked vehicles following. The chase lasted approximately two miles before a marked police vehicle joined. Very shortly thereafter the suspect vehicle slowed down and began operating at a very low speed but not stopping. The suspect's vehicle was spewing smoke and came to a stop in the left hand lane of traffic. The suspect's vehicle would not operate, and the officers could not get it to start. They did not attempt to push it out of the way.

The officers towed the vehicle to the Volusia County Sheriff's Department Operations Center, not the impound center. The officer testified that the reason the vehicle was towed was that it was blocking the roadway and that no one could be called to the scene by the arrestees within a reasonable amount of time to do anything about the vehicle. None of the arrestees were consulted regarding what to do with the vehicle. Although the officer further testified that there is a written policy covering impounding and inventorying of vehicles, that policy was not followed in this case.

The suspect's vehicle was not taken to the impounding area; it was instead taken to the operations center. The officer could not give any reason why the car was not pushed out of the line

of traffic. The officer testified he overheard discussions about where to tow the vehicle and whether to search the vehicle at its present location or wait until it was towed. A decision was made to tow it and search it at its destination, because one officer testified that the officers wanted to know what was inside the vehicle. Prior to inventorying the vehicle, the officers conducted a canine search in which the dog alerted to the trunk area. The officers denied that this sniff affected their decision on how to conduct the inventory.

None of the defendants were given any option regarding whether or where they wanted the vehicle to be towed. The officer never asked the owner (the petitioner's girlfriend, Miriam Suarez) or any person in control of the vehicle

if there were any valuables stored in any part of the vehicle, as required by the Volusia County Sheriff's Office's written policy. The inventory was not done in the presence of either the owner or the driver of the car, as required by that policy. Further, no inventory of the contents of the vehicle was taken prior to the time the vehicle was towed, as required by the Volusia County Sheriff's Office's written policy. Finally, the policy is silent as to the opening of closed personal containers

During the "inventory" search the officers opened the trunk and searched a closed athletic bag, finding five kilograms of cocaine wrapped in towels inside the bag.

Petitioner was charged in the federal court below with conspiracy to distribute in excess of 5 kilograms of

cocaine in violation of 21 United States Code §846, and possession with intent to distribute cocaine in violation of 21 U.S.C. §841(a)(1).

Petitioner contested the search and seizure, by means of a motion to suppress. An evidentiary hearing was conducted by Magistrate Schlesinger of the United States District Court for the Middle District of Florida. Thereafter, the magistrate issued a Report and Recommendation that the motion be denied. (See Appendix A). The district court adopted the Magistrate's Report and Recommendation. The petitioner proceeded to trial, and the contents of the closed container opened during the inventory search were introduced into evidence against him. He was convicted by jury verdict of the offenses charged.

On direct appeal, petitioner asserted that the searching officers operated without any express directive authorizing them to open sealed containers and catalogue their contents pursuant to policy and procedure of the searching agency. The Eleventh Circuit Court of Appeals per curiam affirmed the district court's ruling on the Motion to Suppress and other issues presented on appeal.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction in this cause in order to maintain uniformity with its recent decision in Florida v. Wells, ___ U.S. ___, 109 L.Ed.2d 1 (1990), and Colorado v. Bertine, 479 U.S. 357 (1987). A grant of certiorari is necessary to make consistent the holding by the lower

courts in this case with the explicit holdings by this Court in Wells, and Bertine, as well as consistent holdings by other courts of appeal. Unlike the Eleventh Circuit, the consistent standard that has emerged is that warrantless inventory searches performed without the guidance, or in violation, of standardized criteria or established routine are unreasonable, and thus violative of the Fourth Amendment.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN FLORIDA V. WELLS, ___ U.S. ___, 109 L.Ed.2d 1 (1990) and COLORADO V. BERTINE, 479 U.S. 357 (1987).

In Florida v. Wells, ___ U.S. ___, 109 L.Ed.2d 1 (1990), this Court held that the fourth amendment prohibition against search and seizures applied to

the fruits of warrantless "inventory" searches wherein closed personal containers are opened in the absence of standardized criteria or established routine. 109 L.Ed.2d at 5. This Court stated that where a searching agency has no standardized criteria or established routine channelling police discretion, containers may not be opened for the purpose of an investigatory search. Id. at 6. This Court specifically stated:

> Our view that standardized criteria, ibid. or established routine, Illinois v. Lafayette, 62 U.S. 640 (648, 77 L.Ed.2d 65, 103 Sup. Ct. 2605 (1983)) must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discovery incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory. The individual police officer must not be allowed so much latitude that inventory searches are turned into "a purposeful and general means of discovering evidence of crime." Bertine, supra, at 376, 93 L.Ed.2d

739, 107 Sup.Ct. 738 (Blackmun, J., concurring).

Id. In the record below, the Government failed to present any facts which would establish compliance with standardized written procedures for inventory for the searching law enforcement authorities in Daytona Beach, Florida. In the instant case, the "inventory" of petitioner's vehicle was conducted for an improper investigatory purpose, and closed containers were opened in the absence of standardized policy or procedure.

In Wells, this Court cited the complete lack of conformity of standardized inventory procedures in the record presented, to conclude that the facts demonstrated a "prime danger of insufficiently regulated inventory searches," namely, the danger of pretextual searches of vehicles and their contents. Id. at 7. This Court

considered the lack of written or established policy of the searching agency in Wells, the Florida Highway Patrol. Determining no policies existed mandating the opening of closed containers, this Court affirmed the Florida Supreme Court in suppressing the fruits of the "inventory." Id.

In Wells, this Court reaffirmed its holding in Colorado v. Bertine, 479 U.S. 367 (1987), in which this Court held that the opening of sealed containers during an "inventory" search is permissible only to the extent the searching agency's local procedure mandates the opening of such containers and listing of contents:

> We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and their listing of contents. Our decisions have always adhered to the requirement that inventories be

> conducted according to standardized criteria.

Bertine, at 374 (citations omitted). This principle of adherence to standardized criteria is of central importance, since it limits the discretion of searching officers. Justice Blackmun specifically cited this limitation of discretion in his special concurrence:

> The underlying rationale for allowing an inventory exception to the fourth amendment warrant rule is that police officers are not vested with discretion to determine the scope of the inventory search. This absence of discretion ensures that inventory searches will not be used as a purposeful and general means of discovering evidence of crime. Thus, it is permissible for police officers to open closed containers in an inventory search only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.

Id. at 376-77 (citation omitted) (emphasis added). Thus, the rule is clearly established by this Court that

the standard operating procedures of the searching law enforcement agency must unequivocally establish an across-the-board procedure of opening each and every closed container during an inventory search if the search is to be approved as falling within the inventory exception.

The instant record reveals no such written procedure required by the searching agency, the Volusia County Sheriff's Office. Therefore, the search exceeded its permissible scope, warranting suppression of the evidence improperly obtained.

The record of the hearing on the motion to suppress reveals that the searching agency's policy required consultation with the owner to determine if any valuables were stored in the vehicle, and that an inventory search

was limited only to confirmation of the presence of those previously disclosed valuables.

The record below reveals that neither the petitioner nor any of the other occupants of the vehicle were consulted as to valuables stored within the vehicle, as required by written policy of the Volusia County Sheriff's Office. Nor was the inventory conducted within a limited scope to confirm the existence of such valuables. Instead, the unchannelized, wholesale search which ensued, including the opening of closed containers, was consistent with the pretextual, investigatory purpose of the search.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS FROM OTHER CIRCUITS.

As noted in United States v. Bloomfield, 594 F.2d 1200 (8th Cir. 1979), the interest at work in inventory searches, protection of police against claims of theft or injury, is inconsistent with opening closed containers. Id. at 1202. The court stated:

> ...The only issue for this court is whether, in the inventory search of an automobile, a knapsack found therein should be inventoried as a unit or opened and itemized.
>
> To answer this question we must ascertain whether the governmental interests in performing an inventory search are better served by itemizing the contents of a container or by storing the container as a unit. The commonly avowed purposes of an inventory search are (1) "the protection of the interest property while it remains in police custody"; (2) "the protection of the police against claims or disputes over lost or stolen property"; and (3) "the protection of the police from

potential danger." South Dakota v. Opperman, 428 U.S. at 369.

> In this instance, because the knapsack was tightly sealed and there was no danger of anything slipping out, the first two purposes are better served if the knapsack is inventoried as a unit. In this way the knapsack, which is locked up as a whole in the police headquarters, has never been opened and its contents have never been removed, reshuffled and replaced. To our minds, this would minimize the possibility of loss and the possibility of false claims against the police by the owner.

Id. at 1202.

The instant decision further conflicts with the Ninth Circuit's decision in United States v. Wanless, 882 F.2d 1459 (9th Cir. 1989). In that case, the Ninth Circuit held that to ensure that the inventory search is limited in scope to the extent necessary to carry out the caretaking function, it must be carried out in accordance with state or local procedures. Id. at 1463. The Court then applied the standards of

the Washington State Trooper's manual, finding that the search in question had not conformed to those requirements. Id.

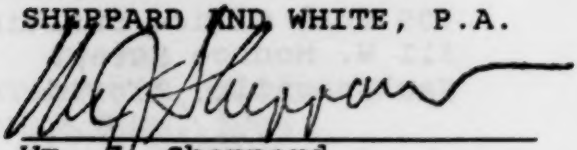
In the instant case there was no compliance with the requirements of the Volusia County Sheriff's Office's written policy and therefore the inventory exceeded the scope permissible.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals in this case is in conflict with authority from this Court and also conflicts with numerous decisions from other circuits. Petitioner respectfully prays this Court to accept jurisdiction in this cause and reverse the decision of the Eleventh Circuit.

Respectfully submitted,

SHEPPARD AND WHITE, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a three (3) copies of the foregoing Petition for Writ of Certiorari have been served this 4TH day of September, 1990, by first class United States mail upon the following:

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lh.17

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

HEBERTO LORENZO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

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ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 88-179-Cr-J-12

HERBERTO ROBALDO LORENZO

REPORT AND RECOMMENDATION

I. STATUS

Defendant, Herberto Robaldo Lorenzo, filed Motions to Suppress both physical and oral statements gained on September 15, 1988, subsequent to a stop of an automobile he was operating. At the hearing, United States announced that they would not introduce Defendant's statements into evidence which mooted Defendant's Motion to Suppress statements filed on November 4, 1988. The United States opposed the suppression of physical evidence asserting Defendant lacked standing and

that it was gained pursuant to a valid inventory search.

II. FINDINGS OF FACT AND AND CONCLUSIONS OF LAW

Officer Robert Francis Schaeffer, from the Volusia County Sheriff's Office, testified that on September 15, 1988, at approximately 8:00 p.m., he engaged in a high speed chase down Highway 90 along with other law enforcement officers pursuing a vehicle Defendant was operating.[1] The chase lasted approximately two miles where the Defendant's vehicle stopped in the left lane of traffic. Officer Schaeffer

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[1] Officer Shaeffer could not testify as to whether or not Defendant was operating the vehicle. However, Agent Dennis G. Wicklein, from the Federal Bureau of Investigations, subsequently testified that Defendant was the operator of the vehicle.

testified that the area was very congested with traffic.

The Defendant and two passengers were taken into custody. Officer Schaeffer testified that he attempted to move the vehicle that the Defendant was driving because it was blocking traffic but that it would not start. Some other law enforcement officer unknown to Officer Schaeffer called a wrecker and the vehicle was towed to the Sheriff's Operations Center (SOC) to be impounded.

After the vehicle was towed to SOC, at approximately 9:00 p.m., Officer Schaeffer testified that he was directed by Sergeant David Hudson to inventory the vehicle. However, prior to inventorying the vehicle, a dog used for detecting drugs was instructed to sniff the exterior of the vehicle whereupon it

alerted to the trunk indicating the presence of drugs in the trunk. Officer Schaeffer testified that it was a coincidence that the K-9 dog was at SOC and that the inventory search would have been conducted regardless. He also testified that it was written departmental policy to inventory a vehicle that had been impounded. (See Exhibit #1).

Officer Schaeffer first inventoried the glove compartment box and examined the owner's registration card which indicated that one of the passengers taken into custody was the owner of the vehicle. Agent Dennis G. Wicklein, from the Federal Bureau of Investigations, testified that the owner of the vehicle was the Defendant's girlfriend and that he was living with her and that they

shared the use of the vehicle as any husband and wife would.

(1) STANDING

The United States asserts that the Defendant lacks standing to challenge the evidence obtained from the vehicle in question. A court may not exclude evidence under the Fourth Amendment unless it finds that the search and seizure violated the defendant's own constitutional rights. **United States v. Payner**, 477 U.S. 727, 731 (1980). It is the defendant's burden to establish his expectation of privacy otherwise known as standing to trigger the protection of the Fourth Amendment. **United States v. Salvucci**, 448 U.S. 83 (1980); **Rakas v. Illinois**, 437 U.S. 128 (1978).

In assessing the Defendant's privacy interests, the Supreme Court has developed a two prong standard in

determining whether he has a legitimate expectation of privacy. First, the defendant must have an actual, subjective expectation of privacy. Second, his expectation must be in accordance with society's notions of reasonableness. **California v. Greenwood**, 108 S.Ct. 1625 (1988); **O'Connor v. Ortega**, 480 U.S. 709 (1987); **California v. Ciraolo**, 476 U.S. 207, 211 (1986); **Oliver v. United States**, 389 U.S. 347, 361 (1984); **Smith v. Maryland**, 442 U.S. 735, 740 (1979).

In the instant case, Defendant seeks to suppress evidence which was obtained from an automobile that he did not own but was operating at the time of the seizure. Defendant never testified that he had an expectation of privacy within the vehicle. However, Agent Wicklein testified that the

owner/passenger was was taken into custody was the Defendant's live-in girlfriend. Considering the close relationship the Defendant had with the owner of the vehicle, the Court concludes that the Defendant had a legitimate expectation of privacy within the vehicle that was searched.

(2) INVENTORY SEARCH

Defendant challenges the legality of the inventory search of the vehicle he was operating asserting it was "unreasonable". It is clearly established that inventory searches are recognized as an "exception to the warrant requirement". **Illinois v. Lafayette**, 462 U.S. 640, 643 (1983); **Colorado v. Bertine**, 479 U.S. 367, 371 (1986); **South Dakota v. Opperman**, 428 U.S. 364, 367-76 (1976). The Supreme Court has recently stated that "an

inventory search may be 'reasonable' under the Fourth Amendment even though it is not conducted pursuant to warrant based on probable cause." Bertine, 479 U.S. at 371 1986); see also Opperman, 428 U.S. at 376. Inventory searches are justified on the need to protect the owner's property, to prevent claims of lost, stolen, or vandalized property, and to protect the police from potential danger. Opperman, 428 U.S. at 369; Bertine, 479 U.S. at 372. This justification is spelled out in the Sheriff's written policy. (See Exhibit #1).

Inventory searches done pursuant to standard police procedures are constitutionally permissible. Bertine, 479 F.2d at 375 n.6; Opperman, 428 U.S. 364, 375-76 (1976); Defendant alleges that the inventory search is

unreasonable because the "the Volusia County Sheriff's Office did not follow ... its own 'standardized' procedures" as stated in Volusia County Sheriff's Department Procedure Directive #G-20-87, sections B, I, L, and N. These sections read as follows:

> B. Vehicle which are to be held for evidence or forfeiture will be towed directly to EVOC during duty hours, or transferred there as soon as possible to avoid storage charges....
>
> I. The owner or person in control of the vehicle will be asked by the deputy if there are any valuables stored in any part of the vehicle. The deputy shall inventory that area of the vehicle even if it is locked to verify their presence and to ensure steps are taken to protect the valuables....
>
> L. If at all possible, inventory will be done in the presence of the owner or driver of the vehicle....
>
> N. An inventory of the contents of all vehicles towed by the Sheriff's Department shall be taken prior to the time the vehicle is towed. If circumstances do not permit a complete inventory at that time, the inventory must be completed at the

storage facility as soon as possible after the vehicle is towed....

Exhibit #1

In reference to section B, supra, Officer Schaeffer testified that the vehicle was not towed to EVOC because it was not during duty hours. Instead, the vehicle was towed to SOC which is consistent with departmental policy. The Court cannot construe any illegal motives by such actions since it was 8:00 p.m. and SOC was only 3-4 miles away where in contrast EVOC was approximately 25 miles away. In addition, it was taken to where the Defendants were being processed and held in custody.

In reference to section I, supra, Officer Schaeffer testified that the Defendants were asked by another officer subsequent to the inventory search regarding whether they had any valuables

in the vehicle. Officer Schaeffer testified that it was relayed to him that the Defendants responded that there were no specific items of value that were not uncovered by the inventory search. Clearly, section I of the procedure direction was followed. The intent of this section is to ensure the protection of property and prevent claims of lost or stolen property. The Court notes that section I does not require the law enforcement officer to ask the owner or person in control of the vehicle prior to the inventory whether he/she has any valuables stored in any part of the vehicle; nor would it make any difference considering section I's purpose.

In reference to section L, supra, Officer Schaeffer testified that the inventory was not done in the presence

of the owner or driver of the vehicle. Officer Schaeffer testified that they were present at the building where the vehicle was inventories. However, the Court finds that this is insufficient by itself to render the search "unreasonable".

In reference to section N, supra, Officer Schaeffer testified that an inventory of the vehicle was not taken prior to the towing of the vehicle. This is not a mandatory requirement and it as reasonable for the law enforcement officers to wait and inventory the vehicle at SOC. Officer Schaeffer testified that the vehicle was immobilized in the left lane in a congested area blocking traffic, presenting a safety hazard. In addition, Officer Schaeffer testified that the speed limit in the area was '60

miles per hour. Moreover, since it was in the evening, it would be more practical to take the vehicle to a well lighted area.

In conclusion, the Court finds that the vehicle was lawfully subjected to an inventory search subsequent to being impounded as testified by Officer Schaeffer. The seizure of the vehicle was not done as a pretext to conduct an unlawful search. Impounding the vehicle was not unreasonable in light of the fact that all occupants of the vehicle were taken into custody and the vehicle was immobilized on a heavily congested highway blocking traffic. As stated in **Opperman**, "[i]n the interests of public safety and as part of what the Court has called 'community caretaking functions,' **Cady v. Dombrowski**, [413 U.S. 433 (1973)] at 441, automobiles are

frequently taken into police custody." **Opperman, 428 U.S. at 368.** The removal of the vehicle from the highway not only protected the lawful owner's property interests, but also removed the traffic hazard it was causing.

In light of the testimony, the Court does not find the presence and search by the drug dog as grounds for establishing a pretextual search. The Court chooses to believe the testimony of Officer Schaeffer who stated the drug dog was present by coincidence. Further, whether or not the officers had subjectively hoped to uncover evidence of a crime in the inventory search does not make it invalid. As stated in **United States v. Bosby, 476 F.2d 1174, 1179 (11th Cir. 1982)**, the mere expectation of uncovering evidence will

not vitiate an otherwise valid inventory search".

Accordingly, the Court finds that the inventory search was reasonable as the inventory search was conducted pursuant to and consistent with departmental policy and the Constitution.

III. RECOMMENDATION[2]

The Motion to Suppress be DENIED.

DONE AND ENTERED at Jacksonville, Florida, this 15th day of November, 1988.

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[2] Any party may file and serve objections hereto within five (5) days after service of this opinion and any opposition thereto within three (3) days as agreed to by the parties. Failure to do so shall bar the party from a de novo determination by a district judge of an issue covering herein and from attacking factual findings on appeal. See 28 U.S.C. §636; Thomas v. Arn, 106 S.Ct. 466 (1986); Nettles v. Wainwright, 677 (Footnote Continued)

HARVEY E. SCHLESINGER
United States Magistrate
United States Magistrate

(Footnote Continued)
F.2d 404 (en banc) (5th Cir. Unit B, 1982); and Local Rule 6.02.

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 89-3551
Non-Argument Calendar

D.C. Docket No. 88-00170-Cr-J-12

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HEBERTO RODOVALDO LORENZO,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

(April 26, 1990)

Before KRAVITCH, ANDERSON, and CLARK,
Circuit Judges

PER CURIAM AFFIRMED. See 11th Cir.
R.36-1

Judgment Entered: April 26, 1990
For the Court: Miguel J. Cortez,
Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: June 12, 1990

IN THE UNITED STATES COURT
OF APPEALS FOR THE
ELEVENTH CIRCUIT

No. 89-3551

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HEBERTO RODOVALDO LORENZO,

Defendant-Appellant.

Appeal from the United States
District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING
(June 7, 1990)

BEFORE: KRAVITCH, ANDERSON, and CLARK,
Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by appellant Herberto Rodovaldo Lorenzo, is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

(2)

No. 90-478

In the Supreme Court of the United States

OCTOBER TERM, 1990

HEBERTO LORENZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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Assistant Attorney General

KATHLEEN A. FELTON
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(202) 514-2217

QUESTION PRESENTED

Whether the warrantless search of the car that petitioner was driving at the time of his arrest was lawful under the Fourth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-478

HEBERTO LORENZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 17) is unreported, but the judgment is noted at 903 F.2d 828 (Table).

JURISDICTION

The judgment of the court of appeals was entered on April 26, 1990. A petition for rehearing was denied on June 7, 1990. The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, peti-

tioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 121 months' imprisonment on each count, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. 17.

1. The evidence at trial established that in the summer of 1988, undercover FBI agents in Florida began negotiating for the purchase of cocaine from a person known to them as "Alfredo," who was later identified as Alfredo Bermudez. Bermudez said he would be able to obtain multiple kilograms of cocaine from his source. In recorded telephone negotiations, the agents agreed to meet Bermudez in Daytona Beach, Florida, on September 15, 1988, to complete the sale of cocaine. Gov't C.A. Br. 4.

On September 15, 1988, undercover agents Teresa McBride and Ronald Boskin met Bermudez and two other people in a Daytona Beach parking lot. All three had arrived together in a car driven by the second man, later identified as petitioner; the third person was Miriam Suarez, petitioner's girlfriend. Gov't C.A. Br. 4; Pet. 4; Pet. App. 4-5. The agents had some discussions with Bermudez, who repeatedly conferred with petitioner in Spanish. Gov't C.A. Br. 4. Before any exchange of drugs was completed, however, an arrest signal was given, and when the agents tried to make arrests the car sped away. FBI agents and other law enforcement officers pursued the car, and a high speed chase ensued along a heavily traveled highway. After about two miles, the car became disabled and came to a stop on the highway. The pursuing officers arrived, arrested the car's occupants, and had the disabled automobile towed to a

nearby facility of the Volusia County Sheriff's Department. Gov't C.A. Br. 4-5; Pet. App. 2-3.

An officer was then directed to perform a search of the car. It happened that a drug-detecting dog was present at the facility where the car had been towed. The dog was allowed to sniff the exterior of the car, and the dog alerted to the trunk of the car, indicating that drugs were present inside the trunk. The trunk was then searched, and five kilograms of cocaine were found in a bag there. Gov't C.A. Br. 5, 9; Pet. App. 3-4; Pet. 7-8. Bermudez, who had pleaded guilty to a charge of conspiracy to possess cocaine with intent to distribute it, testified at trial that petitioner was the source of the cocaine he was negotiating to sell. Gov't C.A. Br. 5-6.

2. Petitioner filed a motion to suppress the cocaine found in the trunk of the car. After a hearing, the magistrate recommended that the motion be denied. Pet. App. 1-16. The magistrate found that impounding the vehicle was reasonable in light of the circumstances, that the seizure of the car was not done as a pretext to conduct an unlawful search, and that the inventory search was properly conducted according to written Sheriff's Department policies.[1] The magistrate also found that the dog sniff of the vehicle did not establish that the inventory was done as a pretext for an investigative search. Pet. App. 8-15. The district court adopted the magistrate's report and rec-

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[1] The magistrate rejected the government's argument that petitioner lacked standing to object to the search of the car. The magistrate found that the car, which petitioner was driving, was owned by petitioner's "live-in girlfriend." In light of the "close relationship [petitioner] had with the owner of the vehicle," the magistrate held that petitioner had a legitimate expectation of privacy in the car. Pet. App. 6-7.

ommendation and denied the motion to suppress. Gov't C.A. Br. 2. The court of appeals affirmed in a per curiam judgment order. Pet. App. 17-18.

ARGUMENT

Petitioner contends (Pet. 11-20) that the decision below conflicts with this Court's holdings in *Florida* v. *Wells*, 110 S. Ct. 1632 (1990), and *Colorado* v. *Bertine*, 479 U.S. 367 (1987). *Bertine* held that inventory searches are lawful as long as they are conducted according to standardized criteria or established routine. *Wells* applied that principle, holding that where the Florida Highway Patrol had no policy at all concerning the opening of closed containers found during an inventory search, the search of such a container was not a "sufficiently regulated" inventory search to satisfy the Fourth Amendment. 110 S. Ct. at 1635. Petitioner claims that the police in this case violated their written policies concerning inventory searches and that, just as in *Wells*, they had no inventory policy at all concerning closed containers and therefore could not lawfully search the closed bag they found in the trunk.

The magistrate reviewed the written policies of the Volusia County Sheriff's Department concerning inventory searches and found that the police conduct in this case—removing the car from a busy highway where it had been disabled and conducting an inventory search of the car—was consistent with those policies. There is no need for further review of this fact-specific application of *Wells*. In any event, regardless of whether the magistrate was correct in holding that the inventory search was conducted in compliance with sufficiently standardized regulations, the search of the car was lawful because the police had probable cause to believe it contained cocaine.

When the agents converged on petitioner's automobile, they not only had probable cause to arrest the occupants, but they also had probable cause to believe the car contained a substantial quantity of cocaine. Petitioner and his companions had just eluded capture at the scene of a planned undercover drug transaction. The entire reason for the meeting was to complete the sale of five kilograms of cocaine that Bermudez had agreed to supply. Bermudez arrived at the scene of the planned drug transaction—the parking lot of a shopping mall—in a car with petitioner and another person and conferred repeatedly with petitioner as he and the agents made final arrangements for the exchange. Under these circumstances, the agents had ample probable cause to believe that the cocaine they had agreed to purchase was inside the car. Moreover, before the inventory search of the car was undertaken, the actions of the drug-sniffing dog provided a further clear indication that the car contained drugs.

It is well settled that a warrantless search of an automobile is permissible when law enforcement officers have probable cause to believe the car contains contraband or evidence of criminal activity. *United States* v. *Johns*, 469 U.S. 478, 484 (1985); *Arkansas* v. *Sanders*, 442 U.S. 753, 760 (1979); *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970); *Carroll* v. *United States*, 267 U.S. 132 (1925). The police could properly have searched the car immediately after the vehicle and its occupants were apprehended, and the propriety of the search was not affected by the removal of the car from the highway to the police facility before the search was conducted. *United States* v. *Johns*, 469 U.S. at 483-487; *Chambers* v. *Maroney*, *supra*. The opening of the bag inside the trunk was

also proper, because the search of a car based on probable cause may extend to the entire car and any container within it that might contain the suspected contraband. *United States* v. *Ross*, 456 U.S. 798, 817-825 (1982). Thus, quite apart from whether the search in this case satisfied all the criteria for a proper inventory search, further review is unnecessary because the search was lawful as a probable cause search of a car.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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